IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Record No. 22,755

ROSALIE RIGGINS,

Appellant

v.

MARGARET K. RIGGINS, Executrix of the Estate of LESLIE E. RIGGINS, Deceased,

Appellee

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT AS TO JURISDICTION

The Complaint filed in the District Court alleged in paragraph 1 that the plaintiff was a citizen of the State of Virginia, and the defendant was a citizen of the State of Nevada, and that the amount in controversy exceeded, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00). The Answer admitted paragraph 1 of the Complaint, which was limited to jurisdiction.

The Complaint alleged that defendant's decedent at the time of his death was indebted to the plaintiff in

the amount of Thirty Thousand Seven Hundred Fifty Dollars ($30,750.00), representing unpaid alimony under a Decree of the Circuit Court of the City of Norfolk, Virginia, entered on July 12, 1947, and demanded judgment for such sum.

The District Court has jurisdiction under 28 U.S.C.A., Section 1332(a). This Court has jurisdiction to review the judgment in question under 28 U.S.C.A., Section 1294, Section 2107, Rule 73(a) Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The question involved on appeal is whether the District Court erred in dismissing the Complaint on the ground that the amount in controversy did not exceed Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. The question was raised by defendant in a Motion to Dismiss after the plaintiff filed a Motion for Summary Judgment.

SPECIFICATION OF ERROR

Appellant relies upon the following specification of errors:

1. The Court erred in dismissing the Complaint on the ground that the amount in controversy did not exceed the amount of Ten Thousand Dollars ($10,000.-00), exclusive of interest and costs.

2. The Court erred in construing the Nevada statute of limitations, N.R.S. 147.090, as the basis of the jurisdictional amount to be lacking.

ARGUMENT

I. THE AMOUNT IN CONTROVERSY IS DETERMINED FROM THE FACE OF THE COMPLAINT, IRRESPECTIVE OF A VALID DEFENSE APPARENT ON THE FACE OF THE COMPLAINT.

This Court, in *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F.2d 453, 455 (1939), said:

> "The Supreme Court in St. Paul Mercury Inc. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 590, 82 L.Ed. 845, gives the rule governing dismissal for want of jurisdiction in cases brought in the Federal Court, as follows '* * * the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction. * * *'"

In *Horton* v. *Liberty Mut. Ins. Co.*, 367 U.S. 348, 352, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961), the Court said:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards. . . .
>
> "The general federal rule has long been to decide what the amount in controversy is from

the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that 'it' must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

In *Smithers* v. *Smith,* 204 U.S. 632, 642, 27 S.Ct. 297, 51 L.Ed. 656 (1907), the Court said:

> "The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except when upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount."

In *Griffin* v. *Smith,* 256 F. Supp. 746 (N.D. Okla. 1966), the defendant moved to dismiss an action to recover on a foreign judgment for child support on the ground of lack of the jurisdictional amount. In overruling the motion to dismiss, the Court said:

> "The fact that a cause of action might be barred by statute of limitations does not remove jurisdiction from federal court to hear action if jurisdictional amount was sued for and would be due and owing but for defense of statute of limitations, and if statute of limitations reduces amount sued for to amount lower than jurisdictional minimum, court has jurisdiction to adjudicate rest of claim."

In *Kissick Const. Co. v. First Nat. Bank of Wahoo*, 46 F. Supp. 869, 871 (D. Nebr. 1942), in holding that the Court still retained jurisdiction to entertain the remaining cause of action aggregating less than the jurisdictional amount after dismissing one cause of action under the statute of limitations, the Court said:

> "In cases where jurisdiction is derived from diversity of citizenship coupled with a controversy involving a statutory minimum amount, it is the sum actually claimed in good faith by the plaintiff when he files his complaint which determines the jurisdiction of the court and the fact that the plaintiff may not succeed in recovering all that he seeks in good faith will not affect the jurisdiction of the Court. *Upton* v. *McLaughlin*, 105 U.S. 640, 26 L.Ed. 1197; *Schunk* v. *Moline, etc., Co.*, 147 U.S. 500, 13 S.Ct. 416, 37 L.Ed. 255; *Smithers* v. *Smith*, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656."

In *Anderson-Thompson, Inc.* v. *Logan Grain Company*, 238 F.2d 598, 601 (10 Cir. 1956), the Court said:

> "In the absence of bad faith or collusion, jurisdiction attaches at the moment of the filing of the complaint and the existence of a good defense . . . will not defeat jurisdiction previously acquired."

The text books uniformly support the position of appellant that the District Court had jurisdiction in this case, to-wit:

1. In 1 Moore's Federal Practice, Section 0.92(1), pages 836, 837, the author states:

> "The fact that there is an apparently valid defense to all or a part of the amount claimed will not destroy federal jurisdiction over the claim. For example, the fact that a cause of action might be barred by a statute of limitations does not remove jurisdiction from the federal court to hear the action. Nor does a defense of the statute of limitations to all or part of the value of the amount claimed affect the jurisdictional basis of this amount in controversy. A defense to the amount claimed might not be raised in the trial on the merits, and even if raised may be shown to be invalid. And a court should not confuse the determination of its jurisdiction with an adjudication on the merits of the validity of the amount claimed. Even if part of the claim is dismissed by summary judgment on the issue of statute of limitations, thereby reducing the remainder to an amount lower than the jurisdictional minimum, the Court still has jurisdiction to adjudicate the rest of the claim."

2. In 1 Barron and Holtzoff, Section 24, page 60, 1967 Pocket Part, it is said:

> "In a related principle, if more than Ten Thousand Dollars ($10,000.00) is claimed in the complaint, jurisdiction exists even though a defense to all or part of the claim may appear on the face of the complaint."

3. In 1 Barron and Holtzoff, Section 24, page 56, 1967 Pocket Part, it is said:

> "In an interesting recent case, a compensation insurer sued in federal court to set aside an award of One Thousand Fifty Dollars ($1,050.00) by the state compensation board, but alleged in the complaint that the employee had claimed Fourteen Thousand Thirty-five Dollars ($14,035.00) before the board. The Supreme Court held that the requisite amount was in controversy since the court, reviewing de novo, might award anything up to the amount the employee had claimed before the board." (Citing *Horton* v. *Liberty Mut. Ins. Co.*, 1961, 81 S.Ct. 1570, 367 U.S. 348, 6 L.Ed.2d 890.

4. In 35A C.J.S. Federal Civil Procedure, Section 274, page 409, it is said:

> "Where the allegations state a cause of action for an amount within the jurisdiction of the court, the fact that a valid defense to the cause is apparent on the face of the complaint does not render it insufficient to invoke jurisdiction or diminish the amount that is claimed in good faith."

5. In 32 Am. Jur. 2d Federal Practice and Procedure, Section 164, page 607, it is said:

> "Whether or not the sum or value of the matter in controversy is sufficient to confer jurisdiction on a federal court is generally determined from the face of the complaint, irrespective of

the defendant's pleadings, or of defenses that may exist to the cause of action. The fact of a valid defense, although apparent on the face of the complaint, does not diminish the amount that is claimed nor determine what is the matter in dispute. Nor does it show bad faith on the part of the plaintiff in the amount that he claims or oust the jurisdiction of the federal court for lack of the requisite jurisdictional amount."

6. In 47 A.L.R.2d 651, 657, it is said:

"The fact that plaintiff's declaration, in setting forth a claim for damages within the jurisdiction of the United States court, discloses that there is available to the defendant a defense which will have the effect of wholly or partially defeating the claim so as to reduce it below the necessary figure, has been held not to affect the court's jurisdiction."

II. CALIFORNIA CASES RELIED UPON BY THE DISTRICT COURT DO NOT SUPPORT THE MOTION TO DISMISS FOR LACK OF JURISDICTION.

It appears that California makes a distinction between a debt completely barred by the statute of limitations and a debt partially barred by the statute of limitations, in construing the statute prohibiting an Administrator or Executor from waiving the bar of the statute of limitations. This was expressly held in *Faias* v. *Superior Court,* 133 Cal. App. 525, 24 P. 2d 567 (1933). Also, the cases of *Re Lucas,* 23 Cal. 2d 454, 144 P. 2d 340 (1943), and *Lewis* v. *Neblett,* 311

P. 2d 489 (1957), indicate that the application of the statute of limitations is not automatic.

III. APPELLEE IS BOUND BY PARAGRAPH 1 OF HER ANSWER ADMITTING THE ALLEGATIONS OF PARAGRAPH 1 OF THE COMPLAINT THAT THE AMOUNT IN CONTROVERSY EXCEEDS THE SUM OF TEN THOUSAND DOLLARS ($10,000.00), EXCLUSIVE OF INTEREST AND COSTS.

This Court, it is submitted, should hold that the appellee is bound by her admission in her answer that the amount in controversy exceeds the jurisdictional amount.

CONCLUSION

It is respectfully submitted that the District Court erred in dismissing the Complaint.

ROSALIE RIGGINS

By BRIAN L. HALL
Attorney for Appellant

In The

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Record No. 22755

ROSALIE RIGGINS,

Appellant

v.

MARGARETT K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee

CERTIFICATE

I, Brian L. Hall, certify that, in connection with the preparation of Appellant's Brief, I have examined Rules 18, 19 and 39 for the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those Rules.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * *

ROSALIE RIGGINS, Appellant, vs MARGARETT K. RIGGINS, Executrix of the Estate of LESLIE E. RIGGINS, Deceased, Appellee.	No. 22755 APPEAL FROM DISTRICT COURT, DISTRICT OF NEVADA

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * *

ROSALIE RIGGINS, Appellant, vs MARGARETT K. RIGGINS, Executrix of the Estate of LESLIE E. RIGGINS, Deceased, Appellee.	No. 22755

APPELLEE'S BRIEF

APPELLEE'S STATEMENT OF THE CASE

Appellant filed her complaint (record p. 1) against the Executrix of the Estate of her former husband on a rejected claim for $30,750.00 unpaid alimony accrued under a judgment for separate maintenance entered on July 12, 1947 by the Circuit Court of Norfolk, Virginia, which required support

at the rate of $150.00 per month. The judgment debtor died on August 30, 1964, without having made any payments.

Both parties concede the applicability of the Nevada statutes governing limitations of action (record p.84), and after the statute NRS 11.190 (Appendix page 1) which limited the instalments to six years, was asserted by appellee, appellant in her brief reduced her demand to $10,800.00 (record p. 54, line 14).

Appellee then moved to dismiss for lack of jurisdiction (record p. 67), claiming that the alimony obligation terminated on the death of the judgment debtor, and that the only unbarred instalments accrued between February 8, 1961 and August 30, 1964. These totalled 31 instalments, which at $150.00 each, aggregated only $6,450.00, which is less than the $10,000.00 requisite for federal diversity jurisdiction.

In the lower Court, appellant did not controvert the foregoing computation (record p. 88 line 12), but relied on the principle that when the complaint in good faith alleges facts supporting a judgment for the jurisdictional amount, the assertion by the appellee of an affirmative statute of limitations defense, which she claimed might have been waived, to reduce recovery below the jurisdictional amount, will not defeat the jurisdiction of the Court. (record pp. 58 and 88).

On her motion to dismiss for lack of jurisdiction, appellee cited NRS 147.090 which provides:

"Effect of statute of limitations. No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim. No claim, which has been allowed, is affected by the statute of limitations, pending the administration of the estate."

and argued (record pp. 71, 88½) that if the facts pleaded in a complaint cannot support a judgment for the requisite jurisdictional amount, a mere prayer or ad damnum clause for more than the jurisdictional amount will not sustain the jurisdiction of the Court.

In its opinion (record p. 87) the lower Court analyzed the impact of NRS 147.090, and, basing its decision on both Nevada and California cases, concluded that this probate law became part of appellant's claim, and restricted the allowable recovery in an action such as this, on a rejected claim, (record p. 91). The Court concluded that this action fell within the principle claimed by appellee, that is, that the maximum possible judgment which could legally be rendered against appellee in her representative capacity as Executrix of the estate, would be the sum of $6,450.00.

The Court pointed out (record p. 92), that the Federal Courts are courts of limited jurisdiction, and held that if jurisdiction did not in fact exist, no personal concession by a litigant can establish it. The Court thereupon dismissed the action (record p. 93).

ARGUMENT

SUMMARY:

Point 1. The amount in controversy for federal diversity jurisdiction is ordinarily determined from the demand stated in the complaint, but this general rule is subject to the exception that if upon an inspection of the Complaint itself, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the subject matter.

Point 2. Under the Nevada statute (NRS 147.090), neither the executrix nor the judge can waive the statute of limitations as to estate claims. The bar applies whether or not the statute is pleaded.

Point 3. The application of this state law to the appellant's claim makes it certain from her complaint that she could recover no more than $6,450.00 plus interest, far less than the minimum jurisdictional amount.

Point 4. The want of federal jurisdiction over the subject matter cannot be waived.

Appellee will first present her argument, and thereafter will refute or distinguish the decisions and authorities cited by appellant.

Point 1. The amount in controversy for federal diversity jurisdiction is ordinarily determined from the demand stated in the complaint, but this general rule is subject to the exception that if upon an inspection of the Complaint itself, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the subject matter.

Appellee will concede that ordinarily for federal jurisdiction the amount in controversy is determined from the demand stated in the complaint.

54 Amer. Juris. 760

But there is the exception that when, from the nature of the case alleged in the complaint, it appears that as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the action.

In said reference in 54 Amer. Juris. it is further stated,

"But in some cases it may appear as a matter of law from the nature of the case stated in the Complaint that there cannot legally be a judgment in an amount necessary to the jurisdiction, notwithstanding the damages are laid in the complaint in a larger sum. When that is the situation and the plaintiff asserts as a cause of action a claim which he cannot be legally permitted to sustain by the evidence, the mere ad damnum clause will not confer jurisdiction."

The leading cases on this point were referred to by the lower Court in its written opinion; (record p. 88½):

North American Transportation and Trading Co. vs. Morrison 1900, 178 US 262, 44 L. Ed. 1061

Vance vs. Vandercook Co., 1898, 170 U.S. 468, 42 L. Ed 1111

In the written opinion of the lower court, this portion of the Vance case was quoted with approval:

"In determining from the fact of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even

"though the damages be laid in the declaration at a larger sum. Barry v. Edmunds, 116 U.S. 550; Wilson v. Daniel, 3 Dall. 401, 407."

The undersigned counsel for appellee submits that one or the other of these decisions have been cited with approval in scores of decisions. No attempt will be made to list all of them. A few of the more or less recent cases, including those from other circuit courts of appeal, are as follows:

KVOS vs Associated Press, 299 U.S. 269, 81 L. Ed. 183 1936

McNutt vs Gen. Motors Accept. Corp., 298 U.S. 178, 80 L. Ed. 1135 1935

North Pac. S. S. Lines vs. Soley, 257 U.S. 216, 66 L. Ed. 203 1921

Gray vs. Occidental Life Co., CCA 3rd 1967, 387 F. 2nd 935

Spires vs North Amer. Accept. Corp., CCA 5th 383 F 2nd 745 1967

Ringsby Truck Lines vs Beardsley, CCA 8th 331 F 2nd 14 1964

Batter vs Williams, CCA 5th 1963

316 F 2nd 540

White vs North Amer. Accident Co., CCA 10th 1963

316 F 2nd 5

Turner vs Wilson Lines, CCA 1st 1957,

242 F. 2nd 414

Giordano vs Radio Corp. of Amer., CCA 3rd 1950

183 F 2nd 558

Hughes vs Encyclopedia Brit., CCA 7th 1952

199 F 2nd 295

Odell vs Humble Oil Co., CCA 10th 1953

201 F 2nd 123

Parmelee vs Ackerman, CCA 6th 1958

252 F 2nd 721

Nixon vs Loyal Order of Moose, CCA 4th 1960,

285 F 2nd 250

McKoy Inc. vs Schonwald, CCA 10th 1965,

341 F 2nd 737

McDonald vs Patten, CCA 4th 1957,

240 F 2nd 424

Herrick vs Sayler, CCA 7th 1957,

245 F 2nd 171

F. & S. Const. Co. vs Jensen, CCA 10th 1964,

337 F 2nd 160

There are many decisions recognizing this rule, but have distinguished the particular facts involved. They include:

St. Paul Mercury, Inc. vs Red Cab Co.,

303 U.S. 283, 58 S. Ct. 586, 82 L. Ed 845 1937

Smithers vs Smith, 240 U.S. 632, 27 S. Ct. 297,

51 L. Ed. 656 1907

It is interesting to note how many times the foregoing two cases have been cited for the rule. Among other similar cases are:

Horton vs Liberty Mut. Ins. Co. (1961)

367 U.S. 348, 6 L. Ed 2nd 890

Jaconski vs Avisun, CCA 3rd 1966,

359 F 2nd 931

Food Fair Stores vs Food Fair, CCA 1st 1959,
177 F 2nd 177

Santiesteban vs Goodyear Tire Co., CCA 5th
306 F 2nd 9 1962

Of other decisions involving the rule are the following decisions of the 9th Circuit Court of Appeals:

Davenport vs Mutual Benefit 1963
325 F 2nd 785

Quinault Tribe of Indians vs Gallagher 1966
368 F 2nd 648

Southern Pac. Co. vs McAdoo, 1936
82 F. 2nd 121

Yoder vs. Assiniboine and Sioux Tribes, 1964
339 F 2nd 360

Electro Therapy Prod. vs Strong, 1936
84 F 2nd 766

Canadian Indemnity Co. vs Republic Co., 1955
222 F 2nd 601

Commercial Casualty Co. vs Fowles, 1946
154 F 2nd 884

City of Forsyth vs Mt. States Power, 1942

127 P 2nd 583

Point 2. Under the Nevada statute (NRS 147.090), neither the executrix nor the judge can waive the statute of limitations as to estate claims. The bar applies whether or not the statute is pleaded.

Appellee contends that this statute is mandatory, and its application to appellant's estate claim makes it appear "to a legal certainty" that only the unbarred instalments of alimony, aggregating $6,450.00, are involved in the action.

The Supreme Court of Nevada has construed the section to be mandatory, and affirmed a decision which sustained a demurrer to the complaint which showed on its face that the claim was barred. Such was the holding in

Jones vs Powning, 1900

25 Nev. 399, 60 Pac. 833

California has the same statute. Their courts have consistently held that the statute is mandatory. This can even be shown for the first time on appeal.

Reay vs Heazelton, 60 P. 977, 1900

Cal. S. Ct.

It will be noted that Judge Thompson quoted at length from this case in his opinion (record p. 89). The quotation is most apt, but need not be repeated here.

Other California cases supporting appellee's construction of this statute are as follows:

Fontana Land Co. vs Laughlin, Cal. S. Ct. 1926
250 P. 669

Bryant vs Superior Ct., DCA 1936
61 P. 2nd 483

Hurlimann vs Bank of America, DCA-Cal. 1956
297 P 2nd 682

Barclay vs Blackington, Cal. S. Ct. 1899
59 Pac. 834

In re Smith's Estate, DCA Cal. 1953
264 P 2nd 638

Many of our sister states have the same statutory provision. In

In re Cocanougher's Estate, Mont. S. Ct. 1962
375 P 2nd 1014

the Montana Court said:

"This section prohibits a waiver of the Statute of limitations by an executor or judge**"

the Court citing with approval the following from a prior Montana case,

"We find ourselves in accord with the rule announced in the foregoing authorities, and

"Where an executor or administrator is defending a claim and it appears to the court by pleading or evidence that the claim, or some part thereof, is barred by the statute of limitations, it is its duty to raise the bar, for otherwise the court, if it disregarded the bar of the statute, would order the claim paid in an action thereon, and on the settlement of an account it would be its duty to disallow the claim once by it ordered paid. Such a situation must not arise."

In like manner, the almost identical statute of Oregon has been sustained by the Oregon Supreme Court, when it affirmed a decision of the lower court sustaining a demurrer to the complaint. This was in

Ricker vs Ricker 1954

270 P 2nd 150

The Court said,

"This statute is mandatory. Under its plain terms, the defendant was expressly prohibited from allowing plaintiff's claim. It is such a claim as cannot be enforced against the estate of decedent. The defendant could not waive the statutory ban."

Wyoming has a statute almost identical to our statute. The Supreme Court held it to be mandatory in the case of

Ellis vs Cauhaupe 1953

260 P. 2nd 309

In this case the Court cited with approval our Nevada decision (Jones vs Powning, supra.)

This circuit court had occasion to construe an almost identical statute of the Territory of Guam, in the case of

Blas vs Talabera, CCA 9th 1963

318 F 2nd 617

In this case the Court held that the record did not disclose that the statute of limitations had run, but stated that if the statute had run, the appellee's petition should not have been granted.

It appears that Michigan has a similar statute. In a recent case of the U.S. Tax Court,

Estate of Anna Lewis,

49 TC No. 73

it was held that where the executrix and the Court had approved a claim, contrary to this statute, the estate would not be permitted to deduct the amount paid thereon in determining the taxable estate for federal estate tax purposes.

Point 3. The application of this state law to the appellant's claim makes it certain from her complaint that she could recover no more than $6,450.00 plus interest, far less than the minimum jurisdictional amount.

As stated by Judge Thompson in his opinion (record p. 91) this probate law becomes part of a claim asserted against an estate and is effective to limit and restrict the allowable recovery in an action on a rejected claim.

Appellee submits that this application of state law to this appellant's complaint is exactly of the same nature as the application of the particular state law to the claim stated in the federal cases holding that the jurisdictional amount was not involved. Reference is made to the following federal decisions specifically involving the state law as it affected the claim:

Davenport vs Mutual Benefit Assn., CCA 9th 1963
325 F 2nd 785

McDonald vs Patton, CCA 4th 1957
240 F 2nd 424

Batter vs Williams, CCA 5th 1963
316 F 2nd 540

Spires vs No. Amer. Accept. Corp., CCA 5th 1967
383 F 2nd 745

Ringsby Truck Lines vs Beardsley, CCA 8th 1964
331 F 2nd 14

White vs No. Amer. Accident Co., CCA 10th 1963
316 F 2nd 540

Parmalee vs Ackerman, CCA 6th 1958

252 F 2nd 721

Herrick vs Sayler, CCA 7th 1957

245 F 2nd 171

Reference is respectfully made to:

North American Transp. & Trading Co. vs Morrison, 178 US 262, 44 L. Ed. 1061-1900

In this case the Plaintiff sued for damages suffered under a breach of a contract whereby Defendant had agreed to carry Plaintiff and his baggage from Seattle to Dawson City. It was conceded that Defendant had failed to perform and the question upon which the jurisdiction of the Court depended was the nature and amount of damages to which Plaintiff was entitled. From a judgment in favor of Plaintiff for TWO THOUSAND THREE HUNDRED ONE AND 75/100 DOLLARS ($2,301.75), (TWO THOUSAND DOLLARS then being the jurisdictional amount), the defendant appealed.

The Court said:

"It is obvious, on the face of the plaintiff's Complaint, that if he was not entitled to recover the money which he alleged he could have earned and secured by obtaining employment and engaging in business at or about Dawson City,' the amount necessary to give the Circuit Court jurisdiction was not involved. While it has

"sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the Circuit Court, that was in suits for unliquidated damages in which the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose and could not disclose but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the Court would not be defeated. But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere ad damnum clause will not confer jurisdiction on the Circuit Court, but the Court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case." Judgment reversed with order to remand to the State Court.

Point 4. The want of federal jurisdiction over the subject matter cannot be waived.

We submit that this rule of law is firmly established by the decisions. Among others are the following:

Mitchell vs Maurer, 293 US 237 1934
79 L Ed 338

Page vs Wright, CCA 7th 1940
116 F 2nd 449

In the foregoing case the answer admitted the jurisdictional facts.

Carr vs Beverly Hills Corporation, CCA 9th 1956
237 F 2nd 323

Royalty Service Corp. vs Los Angeles, CCA 9th 1938
98 F 2nd 551

Minnis vs Southern Pac. Co., CCA 9th 1938
98 F 2nd 913

Kaufman vs Liberty Ins. Co., CCA 3rd 1957
245 F 2nd 918

In the case of Mitchell vs Maurer, supra, the question of the federal jurisdiction had to be based upon the diversity of citizenship. The question was not raised in the District Court, nor in the Circuit Court of Appeals. Mr. Justice Brandeis reversed with directions to dismiss

for lack of jurisdiction, saying: (page 343)

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." (Citing cases.) "Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention of this Court the lack of diversity of citizenship are immaterial."

It will be noted that appellant referred to no authorities on this point in her opening brief. It appears that there are none to which she could refer.

Re: Appellant's Argument:

Appellee submits that the authorities cited in the argument in her brief wholly fail to sustain her position.

Appellant states that "The amount in controversy is determined from the face of the complaint, irrespective of a valid defense apparent on the face of the complaint".

We respectfully object to this inaccurate statement of the rule. We feel that the rule should be stated thusly:

> The amount in controversy is determined from the face of the complaint, irrespective of the fact that it discloses that a valid defense to the claim is available if asserted.

Such is the clear wording of the decision in the case of Smithers vs Smith (supra) cited by appellant. In her quotation it is clear that the defense "might be interposed".

Appellant cites and relies upon the 9th Circuit case of

Armstrong vs New La Paz Gold Mining Co., CCA 9th 1939; 107 F 2nd 453

wherein Judge Stephens quoted from the St. Paul case, with approval, to the effect that it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. Appellant neglects to add the statement of Judge Stephens which follows the quoted statement, as follows:

> "Such legal certainty does not appear in the instant case."

We submit that this certainly recognizes the rule relied upon by the appellee, but distinguishes the case on the facts.

In the ordinary case the statute of limitations is an affirmative defense which can be waived. Such was the basis for the holding in the case of Kissick Construction Co. vs First Nat'l. Bank, 46 F. S. 869, cited by appellant.

The statute was asserted by the defendant as to one cause of action, and the Court held that this did not affect the question of jurisdiction to deal with the second cause of action, once jurisdiction had attached.

Likewise, in the district court case of Griffin vs Smith, 256 F. S. 746, cited by Appellant, it is clear that the Court recognized that the defense might not be asserted.

We submit that this situation is not the same at all as with the facts of the instant case, where the applicable state law prevents the approval of a claim admittedly barred by the statute of limitations.

Appellant cites the case of

Anderson - Thompson, Inc. vs Logan Grain Co.,

238 F 2nd 598 (10th CCA 1956)

We submit that this case is not in point, although the inaccurate statement of the rule appears therein as pure dicta. In this case admittedly the Court had jurisdiction when the complaint was filed. Subsequently the plaintiff sold the seed for salvage value, and the amount of the final recovery was below the jurisdictional amount. This clearly did not affect the jurisdiction.

Appellee submits that the texts and digests cited by appellant, instead of supporting her position, uniformly set forth both the general rule and the exception thereto advanced by appellee in her argument. Appellant has quoted only that which she wished to quote. No effort will be made to point out the differences in each text, but as illustration, appellee will point only to the one reference

in 35A CJS, Federal Civil Procedure, Sect. 274, p. 409. It is also stated therein:

> "Such claim or general allegation is sufficient unless the complaint contains other allegations so qualifying or detracting therefrom that, when all of the allegations are considered together, jurisdiction cannot fairly be said to appear on the face of the Complaint, or, as frequently stated, it appears to a legal certainty that less than the jurisdictional amount is involved."

Appellant presents no argument that the law of Nevada, under NRS 147.090 is not as found by Judge Thompson. She contents herself by citing three California cases, which she claims affect the rule as stated by Judge Thompson.

Appellee contends that none of these cases are in point.

Faias vs Superior Ct., 133 Cal. Appel. 525
24 P. 2nd 567 (1933)

was an application for certiorari to review orders entered in an estate proceeding. One order approved a compromise of a claim, an unspecified part of which was barred by the statute of limitations. The total claim was for $4,700.00, and the compromise was for $3,000.00.

The Appellate Court pointed out that the order approving the compromise was appealable, and if there was error, it was not one subject to correction in certiorari.

Re Lucas, Cal. S. Ct. in bank 1943

144 P 2nd 340

In the case, appeal was taken from the settlement of the account which included a compromise for $500.00, of a claim on a note secured by mortgage signed by deceased. The note was barred by the statute of limitations but it appeared that foreclosure could still proceed, that attorney fees in any event would consume assets of the estate, and to get a clear and marketable title to the real estate was worth the sum to be paid in compromise.

The Court also pointed out that the order of compromise could have been appealed and that this proceeding was a collateral attack on the order of compromise.

In passing, the Court pointed out that if there was a conflict between the statute requiring the rejection of a barred claim, and the authority of the Court to approve a compromise beneficial to the estate, the statute authorizing the latter would govern, since it was adopted later.

In the case of

Lewis vs Neblett, Cal. S. Ct. in bank 1957

311 P 2nd 489

the claim against the estate was to establish a trust in realty. The parties stipulated to an extension of the time of trial beyond five years.

Defendant contended this was void under section 708 of the probate code (our NRS 147.090). The Supreme Court said it was unnecessary to determine whether the five years

provision was a statute of limitation, for if it was, before it ran an administrator could extend it. Court remarks that when it is questionable whether an action against the estate is barred by the statute of limitations, the administrator may enter into an agreement compromising the matter (citing Re Lucas.) The judgment below was affirmed.

This case is obviously not applicable to a money claim clearly barred by our statute of limitations, as in the instant case.

In her brief, appellant claimed that appellee was bound by an admission in her answer to the effect that the Court had jurisdiction. She cited no authorities or decisions supporting this contention. As stated before, there are none that could be cited by appellant to support her contention.

CONCLUSION

It is respectfully submitted that the complaint on its face disclosed that under Nevada law, the most that could be recovered was for 31 instalments of $150.00 each, aggregating $6,450.00, and the Court did not err in dismissing the action for lack of the jurisdictional amount.

R. K. Wittenberg

R. K. Wittenberg, Attorney for Appellee

APPENDIX

N.R.S. 11.190. Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by N.R.S. 11.205, or pursuant to the Uniform Commercial Code, can only be commenced as follows:

1. Within six years:

(a) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * *

ROSALIE RIGGINS, Appellant, vs MARGARETT K. RIGGINS, Executrix of the Estate of LESLIE E. RIGGINS, Deceased, Appellee.	No. 22755

CERTIFICATE OF ATTORNEY TO BRIEF

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. K. WITTENBERG

R. K. Wittenberg, Attorney for Appellee